whether he had signed Ex. P. 5 followed sufficiently closely for those cautionary words to operate on the appellant's mind.

If indeed an inducement was held out then the second part of section 24 comes into play, and it has been said that the proper question is whether the inducement was calculated to make the inculpatory statement an untrue one (*Archbold*, 29th Edition, page 393). Was the appellant placed in a position whereby he might rightly or wrongly conceive that it would be better for him to confess that he had committed a crime, or worse for him if he did not (*R. v. Garner*[3]).

It is the truth that is always sought. It is not because the law is afraid of having the truth elicited that confessions may be excluded, but because the law is jealous of not having the truth (*R. v. Mansfield*[4]). The only proper question is whether any inducement was held out calculated to make the accused's statement untrue (*R. v. Thomas*[5]). Was there a threat or promise of such nature that the accused was more likely to tell an untruth from fear, or hope of profit from any promise (*R. v. Reason*[6]).

I have elaborated the law because I think it well to take this opportunity to illustrate and explain the position in connection with the admissibility or rejection of confessions.

It may also be convenient here to mention that when it is proposed to tender a confession it should not be proffered at the opening of the case as a preliminary issue, but a foundation should first be laid (*R. v. Hammond*[7]). Then evidence may be adduced by the prosecution averring the propriety and legality of the procedure and circumstances whereby the confession was given, and the accused may himself be called as a witness on the issue of admissibility if the justice of the case makes it desirable that this should be done (*R. v. Cowell*[1]). It almost forms a small trial within a trial, and needless to say should the case for the prosecution be opened the prosecuting officer ought not, if the defence is likely to object to the statement to be tendered, make reference to it (*R. v. Hammond*[7]).

In this case it cannot be surmised what decision the learned District Judge would have arrived at if the evidence had been examined from the principles of section 24 of the Evidence Ordinance nor, had procedure followed that which I have outlined above, whether the defence would have been conducted in a different manner. Learned Counsel for the accused was certainly in a strong position when he advised the accused not to give evidence once it was appreciated that the Court intended to disregard section 24 of the Evidence Ordinance — if indeed it was so appreciated, for there is no precise reference to this point in the record of evidence, and it is not apparent until the grounds for judgment are perused.

I am doubtful whether the appellant has suffered any miscarriage of justice, a *prima facie* case of crime appears on the record which should be prosecuted, but I cannot sustain a conviction based on a confession admitted by the Court below wrongly holding it was *not* to be a confession governed by the principles contained in section 24 of the Evidence Ordinance, the consequence of which may have had effect on the accused's election when called on for the defence. It must receive consideration on what it is — an inculpatory statement amounting to a confession.

I shall therefore order retrial. The hearing must commenced *de novo*, and, in the event of the inculpatory statement being tendered and objected to, the learned District Judge should, if the evidence is similar to that in the record of this appeal, direct himself on the principles contained in and arising from section 24 of the Evidence Ordinance.

The conviction and sentence of the Court below is set aside and retrial is hereby ordered.

Retrial ordered.

CHONG CHEE PAK v. PUBLIC PROSECUTOR.

[A. Cr. J. (Callow J.) September 17, 1948]

[Seremban — Criminal Appeal No. 11 of 1948]

Common Gaming Houses Enactment (Cap. 47) s. 4(i)(c) — Charge of "assisting in the management of a public lottery" — Nullity — Criminal Procedure Code (Cap. 6), ss. 156 and 173(a).

In this case the appellant was convicted on a charge of "assisting in the management of a public lottery." On appeal it was argued that the decision was wrong in law in that the appellant was found guilty on a charge which did not disclose an offence known to law.

Held: (1) there is no such offence under s. 4(i)(c) of the Common Gaming House Enactment as "assisting in the management of a public lottery" and therefore the conviction in this case was a nullity; (2) as the proceedings in the Court below were a nullity, a retrial could not be ordered.

Obiter: In the event of further proceedings, a plea of *autrefois convict* would be unavailing, for the appellant had not been in peril.

Cases referred to:—

(1) *R. v. Chong Ah Pye* 4 Ky. 597.

(2) *Lee Seow Kuan v. Rex* (1940) M.L.J. 211.

(3) *Pek Tin Shu v. Public Prosecutor* (1948) M.L.J. 113.

MAGISTRATE'S CRIMINAL APPEAL.

R. H. V. Rintoul for the appellant.

D. W. Good (D. P. P.) for the respondent.

Callow J. : — This is an appeal from the Court of the District Judge, Negri Sembilan sitting in Seremban (by consent from Kuala Pilah) against the conviction and sentence which consisted of fine and forfeitures imposed on the 16th of July, 1948, for an offence charged under section 4 (i) (c) of the Common Gaming Houses Enactment.

It was agreed that argument should first be heard and decision sought on the grounds set out in paragraph 2 of the petition which reads :—

Your Petitioner is dissatisfied with the said Judgment on the grounds following:—

(a) The decision was wrong in Law in that the Appellant was found guilty on a charge which did not disclose an offence known to law.

(b) The only offences defined by s. 4(i)(c) of Chapter 47 are:—

(1) Having the care or Management of a Place kept or used as a Common Gaming House.

(2) Assisting in the Management of a Place kept or used as a Common Gaming House.

(3) Assisting in carrying on a Public Lottery.

Your Petitioner will therefore contend that there is no such offence as "*assisting in the management of a public lottery*".

Mr. Rintoul for the appellant argued that the Enactment (Cap. 47) must be strictly construed, and he relied on the reported cases of *R. v. Chong Ah Pye*[1] and *Lee Seow Kuan v. R.*[2].

In *Chong Ah Pye's case* O'Malley C.J. pointed out in his judgment that assisting in the management of a public lottery was not an offence within the Enactment. Forty years later Terrell Ag. C.J. observed in *Lee Seow Kuan's case* that there is no such offence as assisting in the management of a public lottery.

It seems unfortunate that neither reported case was brought to the notice of the Court below. From the record it would appear that neither the prosecutor nor learned Counsel for the accused appreciated the point now taken here, and taken here it may be (*Pek Tin Shu & anor. v. Public Prosecutor*[3]).

The learned Deputy Public Prosecutor (Mr. Good) supported the conviction and invited this Court to uphold it notwithstanding the two reported cases. He argued that in *Chong Ah Pye's*[1] *case* the conviction was quashed on a matter of evidence, and not on account of the wording of the charge; and in *Lee Seow Kuan's*[2] *case* the observation of Terrell Ag. C.J. was *dictum.*

Mr. Good argued that the phrases "assisting in the management of a public lottery" and "assisting in carrying on a public lottery," although not synonymous, are of the same subject matter. He urged that an equivalent expression in a charge is permissible, and went on to illustrate the argument.

The grounds of appeal set out above show clearly the three offences contained in section 4 (i) (c) of Cap. 47. It is an offence *to assist in the management of a place* kept or used as a common gaming house, or *to assist in carrying on a public lottery.* Here the charge in the Court below was a mixture of the two — assisting in the management of a public lottery. Does assisting in the management necessarily include assisting in the carrying on? I suppose one could *assist* in the management of an establishment by cooking for its inmates, but that would scarcely mean assisting in the carrying on of a public lottery.

From the evidence it appears that the trial proceeded as if the accused had been charged with carrying on or continuing with the business of a public lottery. The learned District Judge held the accused was the promoter of the lottery, yet he found him guilty of the charge of assisting in the management of a public lottery.

As pointed out in *Braddell* on Common Gaming Houses (2nd edition pages 5 & 6) lotteries are not *mala per se,* and the Enactment being of a highly penal character, interfering with the liberty of the subject, must be construed strictly.

Mr. Good referred to section 156 of the Criminal Procedure Code and submitted that at the highest the difference between the charge laid and that which would have complied strictly with the Enactment was one of error, therefore unless the appellant had been misled it should not be regarded material. I am doubtful if the appellant was misled, but agianst section 156 is section 173 (a) which requires the charge containing the particulars of the offence to be framed, read and explained; and section 152 (i) demands that the charge states the offence, not, I think, in language from which the accused should infer the nature of the charge, but in terms precise and accurate. There is certainly substance in Mr. Rintoul's argument that the prosecution on proving certain facts might say "We charge you under section 4 (i) (c), and although the facts which we allege against you do not fall within the scope of section 4 (i) (c), you should have known what was meant".

It is hardly possible that during the passage of time the point has not received the attention of the Crown Law Officers; and it would therefore seem to have been accepted that "assisting in the management of a public lottery" is not an offence within the Enactment. It is quite logical to criminate a person assisting in the actual conduct (or carrying on) of a public lottery, whereas many difficulties can be envisaged on

a charge of assisting in the management of a public lottery. I interpret assisting in the carrying on as some overt act directly connected with the promotion of the lottery; whereas assisting in the management might extend to the printer who sells the paper or the workman who maintains the premises. Assisting in the management of a place *kept or used as a common gaming house* might cover the instances I have illustrated, but I think this difference I have tried to demonstrate has been appreciated by the Legislature, and so the law has remained unamended, for amended or challenged one would expect to find it in consequence of the reported cases.

I do not think I am impelled to follow the reported cases of *R. v. Chong Ah Pye*[1] and *Lee Seow Kuan v. R.*[2]. Both are Straits (Singapore) cases but the Enactment is the same. In each is contained expressions intimating that the charge of assisting in the management of a public lottery is one not within the Enactment. I am not inclined to differ, indeed with respect I agree.

Again with respect I follow O'Malley C.J. in *Chong Ah Pye's*[1] *case* when he said that in his opinion there was a proper charge which could be preferred on the facts proved. Reading the record in the appeal now before this Court there undoubtedly appears to be facts on which a proper charge could be preferred.

But I regret I have to differ with the learned Chief Justice on his ultimate order of retrial. I agree with Mr. Rintoul for the appellant that what has happened is in effect a nullity. The appellant faced trial on a charge not known to law; had it been a legitimate charge, though the facts proved another offence, I would have considered altering the charge, although I am doubtful if it could be done. In the Indian Code of Criminal Procedure it may be done by virtue of section 423(d) (*Sohoni*, 14th Edn. page 805, para. 62), but that sub-section does not appear in the Criminal Procedure Code of this country.

Nor can I order re-trial, for the charge in the Court below being one without the law, it follows that the proceedings were a nullity, and while the re-trial of a trial may in appropriate circumstances be ordered, the re-trial of a nullity is an impossibility.

On the opposite side Mr. Rintoul conceded that in the event of further proceedings a plea of *autrefois convict* would be unavailing, for the appellant has not been in peril.

I therefore rule that the proceedings in the Court below were a nullity. The conviction and sentence, including the forfeitures, are quashed, and I direct that they should be expunged from the record of the Court below.

In order to afford opportunity for further proceedings the exhibits will remain in Court for a period of 14 days.

Conviction quashed.

POH BOON PIN v. PUBLIC PROSECUTOR.

[A. Cr. J. (Hill J.) September 18, 1948]

[Alor Star — Criminal Appeal No. 68 of 1948]

Sanitary Boards Enactment (Kedah), s. 4 — Sanitary Boards (Amendment) Enactment, No. 7 of 1358, — Whether bye-law is ultra vires.

In this case the appellant had been convicted of an offence under Bye-laws relating to building made under the Sanitary Boards Enactment as amended by the Sanitary Boards (Amendment) Enactment. On appeal it was argued that Bye-law 13 was *ultra vires*.

Held: (1) the Sanitary Boards Enactment as amended by the Sanitary Boards (Amendment) Enactment gave the Sanitary Board power *inter alia* to prohibit the erection of an unsightly building, but did not empower the Board to order the demolition of a building already erected no matter how unsuitable it might be; (2) Bye-law 13 in so far as it permitted the Sanitary Board to order any building to be demolished by reason of its being unsuitable to the locality, was *ultra vires*.

Cases referred to :—

(1) *Wong Poh v. Public Prosecutor* (1949) M.L.J. 1.

(2) *Low Leong Huat v. Public Prosecutor* (1917), 2 F.M.S.L.R. 162.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Ean for the appellant.

C. V. Boyle (D. P. P.) for the respondent.

Hill J. : — The appellant was on 3rd July, 1948, convicted in the Magistrate's Court, Alor Star, on the following charge :—

That you are in possession of an attap shed at Jalan Baru, Alor Star, constructed from jungle rollers for pillars, attap roof, earth ground floor and size is about 50 x 80 feet, being of such a nature as to be unsuitable to the locality. Thereby you have committed an offence under s. 13 By-Laws relating to building, punishable under the same section.

He was fined $50 in default one month's rigorous imprisonment and ordered to demolish the building.

From this conviction, sentence and order he has appealed. There are two grounds of appeal, that bye-law 13 is *ultra vires* and alternatively that the trial Magistrate should not have been satisfied with the propriety of the order of the Town Board.